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No. 88-1575

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

MAGGIE ADAMS, formerly known as
MAGGIE JO KOZA,

Petitioner,

v.

THE STATE OF NEVADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF NEVADA

RESPPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Nevada Supreme Court incorrectly applied this Court's standards and erred in its determination that the admission of certain evidence at Petitioner's trial was harmless error.

2. Whether this Court should intervene to resolve an alleged conflict between the circuits regarding intercepted telephone communications.

STATEMENT OF THE CASE

Petitioner and her husband were arrested on November 5, 1980. The two were ultimately charged with murder and robbery, both with the use of a deadly weapon. At trial, the following facts were elicited.

On October 25, 1980, a taxicab, which had been driven off of the road, was discovered on the outskirts of Las Vegas.

Behind the cab was a man's body lying on the ground. The body was identified as the cab's driver who had died as a result of two .25 caliber gunshot wounds to the back of the head.

An investigation revealed that the cab driver's last fare had been picked up at the Tropicana Hotel. Although the cab driver's trip sheet recorded $76.85 in fares, no money was ever recovered from the driver or the cab's safe.

Approximately eleven days after the discovery of the murdered cab driver, the manager of a motel located close to the Tropicana Hotel was connecting a telephone call when he inadvertently overheard a female caller inquire "Do you have your gun?" Because he was concerned about motel security, the manager listened a minute or two longer and heard the following:

Female: Do you have your gun?

Male: Yes, I have mine; do you have yours?

Female: Yes, I have mine in my purse. I am over here now, and here is what we will do. On the way over, I will sit in the back seat of the car; and when we get to the rear of the hotel I will get the drop on them.

Male: Be careful, there are two of them.

Female: Don't worry. If they try anything I will blow their brains out. I will have him toot the horn, and that will be your signal to come around and get into the car.

Suspecting that a robbery might occur on the premises, the motel manager telephoned the police.

After arriving at the motel and observing activity at the room which had received the suspicious telephone call, police officers knocked on the room's door and announced their presence. From inside the room came the sound of the slide action of an automatic pistol, which prompted the officers to call out to the room's occupants that they were under cover and should exit. The door to the room opened slightly and Petitioner peered out. Petitioner and her husband had been staying in the motel room. Both were arrested and charged with conspiracy to commit robbery.

A "protective sweep" of Petitioner's room turned up a .25 caliber automatic handgun and two other guns. Further invest-

igation revealed that the bullets recovered from the murdered cabdriver had been fired from the .25 caliber handgun recovered from Petitioner's motel room, and that a latent palm print recovered from the fender of the taxicab matched Petitioner's palm print. Additionally, witnesses identified Petitioner as having been near the scene of the murder on the night in question.

The jury convicted Petitioner and imposed a sentence of life imprisonment without the possibility of parole. Petitioner appealed her conviction to the Nevada Supreme Court which court determined that Petitioner's confession, which had been admitted at trial, had been obtained in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), and should have been suppressed. The conviction was reversed, and the case remanded for a new trial.

At the end of the second trial, Petitioner was again convicted and sentenced to life imprisonment without the possibility of parole. Petitioner appealed the conviction and the Court affirmed the judgment. A petition for rehearing was denied. Petitioner is now petitioning this Court for certiorari.

SUMMARY OF ARGUMENT

I

Petitioner's claim that the Nevada Supreme Court erred in upholding the trial court's decision is not substantiated by either the facts or the law. It is alleged that the admission of evidence secured through Petitioner's custodial statement was in error. Because Petitioner's limited request for an attorney was complied with, the statement was not illegally obtained

and any evidence arising therefrom was not tainted.

If the custodial statement was illegally obtained, the evidence arising from the statement was far enough removed from the illegal actions as to attenuate any taint. Thus, such evidence was still properly admissible at trial.

Finally, if both the confession and evidence were tainted, the admission of the evidence would be considered harmless error under this Court's standards.

II

Both the Fifth and Tenth Circuit Courts of Appeals have decided cases in which a switchboard operator's inadvertent overhearing of a wire communication was held to have not violated federal wiretapping statutes. These interceptions were considered exceptions to the law. The Elev-

enth Circuit Court of Appeals determined that a business' intentional monitoring of employees' personal telephone calls did not fall into any exceptions and therefore violated federal wiretapping laws.

Because these three circuit cases were determined upon different grounds, there was no conflict between the courts which would require this Court's intervention.

ARGUMENT

I

THE NEVADA SUPREME COURT PROPERLY DETERMINED THAT THE ADMISSION OF CERTAIN EVIDENCE AT PETITIONER'S TRIAL HAD NOT BEEN IN ERROR AND DID NOT UNDULY PREJUDICE PETITIONER.

Petitioner contends that Nevada's Supreme Court improperly upheld a conviction which was based in part upon allegedly

tainted evidence, and incorrectly determined that the admission of such evidence had been harmless error. This argument is premised upon Petitioner's observation that in applying established state law, Nevada's high court reiterated a standard contrary to the decisions of this Court regarding the concept of "harmless error."

In order to analyze the merits of Petitioner's argument, it is necessary to first review the facts of the case and the issues involved in the state Supreme Court's original decision. Petitioner appealed her conviction, claiming in part that her custodial confession should not have been admitted at trial. The Nevada Supreme Court, following this Court's directive in Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880 (1981), determined that the confession should have been suppressed because Peti-

tioner had invoked her right to counsel and police officers violated that right by continuing their questioning. The judgment of the trial court was reversed, and the case remanded for further proceedings.

Petitioner received a second trial and was again convicted. A second appeal was taken in which Petitioner claimed that the use of witnesses discovered as a result of the illegally obtained confession violated Petitioner's constitutional rights. Petitioner reasoned that since the confession had been illegally obtained, any evidence arising therefrom would be inadmissible at trial.

What happened to Petitioner is factually distinguishable from the scenario in Edwards v. Arizona, supra, and Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404 (1986)(the cases cited to by the Nevada

Supreme Court in its first decision). The morning after her arrest, Petitioner was interviewed by local detectives. Before any questioning began, the detectives advised Petitioner of her rights pursuant to this Court's decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966). Petitioner asked that she be permitted to speak to her husband before discussing any murders. The detectives then ceased questioning Petitioner and arranged for a telephone conversation between Petitioner and her husband.

After speaking with her husband, Petitioner told the detectives that she wanted to talk to attorney John Momot. The detectives did not question Petitioner any further. A few hours after Petitioner's request, Mr. Momot arrived at the detective bureau and conferred with Petitioner. Mr.

Momot told the detectives that he did not know if he would be representing Petitioner and her husband, but at that time he represented both and had advised Petitioner not to talk to the detectives.

The day after Petitioner had spoken with Mr. Momot, one of the detectives telephoned Mr. Momot to inquire whether Petitioner's husband had invoked his right to counsel. According to the detective, Mr. Momot informed him that the detectives were not to question Petitioner's husband and that he was not representing Petitioner. (Mr. Momot testified that it was not until a few days after this incident that he first informed the detectives he would not be representing Petitioner). Following the conversation with Mr. Momot, the detectives again advised Petitioner of her rights and informed her that they had evidence connecting her to a

murder. Petitioner then detailed her involvement in three separate murders.

Based upon the above-outlined facts, the Nevada Supreme Court determined that Petitioner's confession had resulted from continued police questioning following Petitioner's invocation of her right to counsel; therefore, Edwards v. Arizona, supra, required suppression of the confession. The State, on the other hand, argued in response to Petitioner's second appeal that the Edwards decision had not been violated in Petitioner's case. The petitioner in Edwards v. Arizona, supra, told the police officers that he wanted an attorney before making any "deals". The officers ceased questioning for the day, but questioned the petitioner the next day without ever providing the requested attorney. Petitioner in the present action asked specifically if she

could speak to Mr. Momot. This limited request was honored by the detectives. Petitioner had the opportunity to speak with the attorney, after which, Petitioner was again informed of her rights and did not ask to see her attorney. Instead, Petitioner detailed the crimes in which she had been involved and thus, disregarded Mr. Momot's advice not to speak to the detectives. Petitioner's was not a case where her request to speak to an attorney was overlooked.

Following the Edwards decision, this Court noted that the settled approach to questions of waiver requires a broad interpretation of a defendant's request for counsel. However, "[i]nterpretation is only required where the defendant's words, understood as ordinary people would understand them, are ambiguous." Connecticut v.

Barrett, ___ U.S. ___, 107 S.Ct. 828 (1987). In the Barrett case, the defendant told the police officers that he would not give a written statement unless his attorney was present, but he agreed to give an oral statement. Because of a malfunctioning tape recorder, one of the police officers reduced to writing his recollection of the defendant's statement. The Connecticut Supreme Court held that such statement should have been suppressed because the defendant had invoked his right to counsel for all purposes. This Court reversed that decision, holding that the Constitution did not require suppression since the invocation of the right had been limited by its terms and did not prohibit all further discussion with the police.

The Barrett decision has somewhat narrowed the scope of the holding in Edwards supra.

In a case following the Barrett decision, Griffin v. Lynaugh, 823 F.2d 856 (5th Cir. 1987), the Court of Appeals determined that a defendant's request to speak to a particular attorney was not an invocation of a general right to counsel. Because the police honored the defendant's request and resumed questioning after the defendant had spoken with the attorney, the defendant's subsequent confession was held to have been admissible at trial. "As in Barrett the request made by the accused was unambiguous; Griffin wanted to talk to his attorney whom he identified by name. As in Barrett, the police honored the request. As in Barrett, there is not one scintilla of evidence of police overreaching.

Here, once Griffin asked to speak to his attorney, interrogation immediately ceased, and arrangements were made for Griffin to

speak to the attorney he had requested. Furthermore, when Griffin had concluded his conversation with his attorney, the police sought to assure that his request had been fully honored by inquiring whether he wished to talk to any other attorney. At that point, Griffin stated that he did not want to speak to another attorney at that time. Before interrogation resumed, Griffin was once again given his Miranda rights. The Supreme Court's conclusion in Barrett, applies with equally great force here: there is no constitutional objective that could be served by suppression." (emphasis in original), Griffin v. Lynaugh, supra, 823 F.2d at 863.

Like the defendants in Barrett and Griffin, supra, Petitioner made a limited rather than a broad, all-encompassing request for counsel. The fact that Petitioner stopped the questioning in order

to speak with Mr. Momot demonstrated her awareness of her right to counsel. All questioning stopped following the request, and Petitioner was given the opportunity to speak to Mr. Momot. When Petitioner again met with the detectives, she was advised that she did not have to talk to the detectives. Petitioner chose to make a statement after being told by both the detectives and Mr. Momot that she was not required to do so. Petitioner did stop the questioning at the first interview, thus, she was aware of her rights. Because Petitioner made a limited request for counsel (she did not state that she wanted an attorney before proceeding any further), and because the authorities complied with this request, Petitioner's confession was not illegally obtained, just as the statement in Barrett, supra, had not been

illegally obtained.

If there was no Edwards violation, Petitioner's confession would have been properly obtained, meaning that any evidence arising therefrom would not have been "fruit of the poisonous tree." Thus, evidence which Petitioner claims was "tainted" because her confession had been tainted could have been admissible, and the Nevada Supreme Court's holding that admission of such evidence was harmless error was not in conflict with the dictates of this Court.

Assuming, as the Nevada Supreme Court did in its first decision, that Petitioner's confession was not admissible at trial, it does not automatically follow that all evidence which arose from the confession had to have been suppressed.

This Court has noted:

> [W]e need not hold that all

> evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'

Wong Sun v. United States, 371 U.S. 471, 487-488, 83 S.Ct. 407, 417 (1963). In Wong Sun, supra, narcotics which had been discovered through an illegally obained statement were not to be used against the declarant. This Court found that such

evidence, directly springing from the defendant's admissions, had been discovered as a result of the exploitation of the illegality, and was tainted.

While Wong Sun, supra, dealt with the discovery of physical evidence, United States v. Ceccolini, 435 U.S. 268, 98 S.Ct. 1054 (1978), involved testimony of a live witness who was not a defendant in the case. The Ceccolini case further qualified the Wong Sun, "fruit of the poisonous tree" analysis by distinguishing between live witness testimony and inanimate evidentiary objects. "[E]valuated properly, the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live-witness testimony than other kinds of evidence ... the illegality which led to the discovery of the witness very often will not play any meaningful part

in the witness' willingness to testify." United States v. Ceccolini, 435 U.S. at 276-277, 98 S.Ct. at 1060.

Petitioner's case, like Ceccolini, supra, involved the use of live witness testimony which Petitioner claims was "fruit of the poisonous tree." When Petitioner made her statement to the detectives, she related that following the murder, she and her husband had hitchhiked back to their motel. A young man and his friends had been driving by in a pickup truck and offered the couple a ride.

In order to uncover the identity of the young man who had given Petitioner a ride on the evening in question, the police officers published a newspaper account of certain facts surrounding the murder which had been known prior to Petitioner's confession. The article inquired about people who might have picked up

hitchhikers on the given evening. One of the witnesses, David Berry, voluntarily responded to the newspaper article, contacting the police to report that he had picked up two hitchhikers a short distance from the crime scene on the evening of the murder. The identity of the other witnesses was revealed through David Berry's initial contact with the police.

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers,

> or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

Michigan v. Tucker, 417 U.S. 433, 447, 94 S.Ct. 2357, 2365 (1974). In Michigan v. Tucker, supra, eyewitness testimony discovered as a reult of a statement obtained in violation of the defendant's rights was found to be admissible, as society's interest in effective prosecution of criminals outweighed any reasons supporting exclusion. This Court reasoned that "[w]hatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony

of the witness ... as well." Tucker, supra, 417 U.S. at 448, 94 S.Ct. at 2365-2366.

Nevada's Supreme Court has also considered whether the fruits of confessions given without proper procedural protections may be received into evidence. In conformity with the Tucker decision, the Nevada court determined that testimony of a witness whose identity was secured from a defendant's confession could be admitted at trial as long as the confession had not been compelled and there had been no direct infringement upon the defendant's right against self-incrimination. Rhodes v. State, 530 P.2d 1199 (Nev. 1975).

Returning to the case at bar, it is apparent that even if Petitioner's confession had been obtained in violation of her rights, the testimony of David Berry and

his friends was properly admitted at trial. Within Petitioner's confession, she mentioned that she had been given a ride by some young people on the evening of the murder. From this simple comment, the police were able to track down the witnesses.

In questioning Petitioner, it had not been the intention of the detectives to find witnesses. Thus, application of the exclusionary rule would not have had a great deterrent effect upon the officers. As noted above, where the official action was undertaken in good faith, the deterrence rationale loses much of its force. The detectives complied fully with Petitioner's requests, and properly informed her of her rights before beginning any questioning. The officers proceeded in good faith.

Additionally, the fact that Petitioner

had not even known the witnesses who testified at trial, and the fact that these witnesses voluntarily responded to the police officers' inquiry further attenuated the link between Petitioner's confession and the evidence. The Wong Sun attenuation exception to the "fruit of the poisonous tree" doctrine is applicable to Petitioner's case.

Accordingly, the admission of the allegedly "tainted" testimony was not in error, and the Nevada Supreme Court did not err in approving the trial court's actions.

Finally, it is necessary to address Petitioner's argument for why the writ should be granted. Assuming arguendo that Petitioner's confession was obtained in violation of the rule in Edwards v. Arizona, supra, and assuming arguendo that the admission of evidence which arose from the

illegally obtained confession was erroneous, Petitioner contends that admitting such tainted evidence at trial amounted to reversible error. Following this reasoning, Petitioner asserts that the Nevada Supreme Court incorrectly determined that the admission of the tainted evidence had been harmless error.

Petitioner argues that the Nevada standard for determining harmless error is contrary to this Court's most recent enunciation of the standard. In Satterwhite v. Texas, ___ U.S. ___, 108 S.Ct. 1792 (1988), this Court examined whether a deprivation of the right to counsel in a psychiatric evaluation prior to a capital sentencing proceeding could be subjected to harmless error analysis. It was held that the Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967) harmless error rule applies to the admission

of psychiatric testimony obtained in violation of certain Sixth Amendment rights. The Chapman rule provides that if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict, the error is harmless.

In Satterwhite, supra, the challenged testimony was obtained directly in violation of the defendant's rights. In Petitioner's case, which is not a capital sentencing case, the challenged testimony was an indirect offshoot of evidence allegedly obtained in violation of Petitioner's rights. Petitioner's is not the same type of case as Satterwhite wherein this Court held that the Chapman harmless error rule should apply.

Even so, in applying the Satterwhite rationale to the present action, the error

complained of did not significantly contribute to the verdict. Had Satterwhite been followed, the same result would have emerged. The challenged testimony placed Petitioner near the scene of the crime. Other properly admitted testimony, such as Petitioner's palm print on the taxicab, pointed toward the same conclusion.

Asssuming arguendo that the Nevada Supreme Court did not apply the proper harmless error rule, the fact still remains that based upon the arguments above, the challenged testimony was properly admitted. Thus, the decision was correct, it was simply based on the wrong reason. This Court has long recognized that "[i]n the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed, although the lower

court relied upon a wrong ground or gave a wrong reason." Brown v. Allen, 344 U.S. 443, 459, 73 S.Ct. 397, 408 (1953), quoting from Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 157 (1937).

Petitioner's argument is based upon an alleged violation of her constitutional rights. A careful analysis reveals that these rights were not violated. The challenged evidence was properly admitted at Petitioner's trial. The admission of the evidence did not amount to reversible error.

II

THERE IS NO CONFLICT BETWEEN THE FEDERAL COURTS OF APPEALS REGARDING THE INTERCEPTION OF TELECOMMUNICATIONS WHICH WOULD REQUIRE THIS COURT'S INTERVENTION.

Petitioner argues that this Court should

grant certiorari to resolve a conflict between the Eleventh Circuit Court of Appeals and two other circuits. Three cases are cited which Petitioner contends are in conflict. A careful reading of these cases resolves this supposed conflict, for the issues are clearly distinguishable.

In Petitioner's case, her arrest was precipitated by a motel desk clerk's inadvertent overhearing of a portion of a telephone conversation between Petitioner and her husband. Specifically, the motel clerk, who was also the motel manager, had been operating the switchboard in the usual course of business when Petitioner's call came through. The clerk accidentally connected into Petitioner's line and overheard a brief portion of the incriminating conversation.

Nevada's Supreme Court determined that

the clerk's listening to the conversation had been warranted by his "reasonable apprehension that unlawful and life-threatening conduct was about to occur in his motel." Koza v. State, 681 P.2d 44, 48 (Nev. 1984). The court held that the initial interception had not been unlawful and was subject to disclosure at trial. In support of this determination, Nevada's court cited to United States v. Axselle, 604 F.2d 1330 (10th Cir. 1979) and United States v. Savage, 564 F.2d 728 (5th Cir. 1977). These are the two cases which Petitioner claims are in conflict with Watkins v. L. M. Berry & Company, 704 F.2d 577 (11th Cir. 1983).

Both Savage and Axselle, supra, involved inadvertent interceptions of telephone communications by motel switchboard operators. In each case, the courts found no

violation of 18 U.S.C. §§ 2510-2520. The Savage decision noted that the operator's actions fell within two exceptions to the federal law: (1) the operator intercepted the call in the normal course of her employment, and (2) the interception had not been willful as prohibited by the statute. Axselle, supra, also found that the challenged interception had not been willful and thus had not been illegal.

The third case cited by Petitioner, Watkins v. L. M. Berry & Co., supra, involved a scenario factually distinguishable from Savage and Axselle, id. Watkins involved a telephone solicitation business which had an established policy of monitoring employee's business calls. The employees were notified of this monitoring which took place via a standard extension telephone. A problem arose when the employer

listened in on an employee's personal telephone call. Personal calls were not to be monitored. The Eleventh Circuit Court of Appeals determined that such interception of the call had violated the federal statute. The call had been willfully intercepted and had not fallen under any exception (i.e., consensual, or undertaken in the ordinary course of business).

Clearly, the Watkins case was not on point with Savage, Axselle or Petitioner's case. Watkins, id. was not in conflict with the above-cited cases because it was decided on a different factual basis. Thus, there is no conflict between the circuits on this issue.

Petitioner's case was factually on point with Savage and Axsell, supra, and was decided in conformity with those cases. Petitioner has not demonstrated that a conflict exists between the circuits which

would require this Court's intervention.

CONCLUSION

The Nevada Supreme Court correctly upheld the trial court's decision regarding admissibility of evidence, and did not depend upon case authority in conflict with the decisions of this Court.

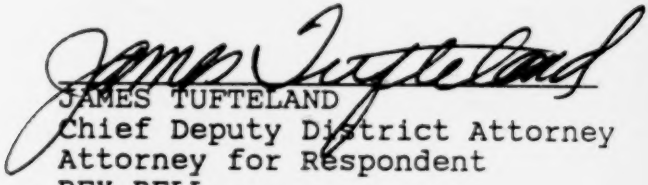
Additionally, there is no conflict between the circuits regarding admissibility of intercepted wire communications.

Accordingly, there has been no showing of any special or important reasons which would require this honorable court's intervention in the present action. Based upon the foregoing arguments, it is respectfully

requested that the writ be denied.

Dated this 12th day of April, 1989.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of RESPONDENT'S BRIEF IN OPPOSITION to the attorney of record listed below on this 12th day of April, 1989:

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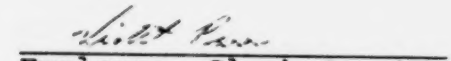

Employee, Clark County
District Attorney's Office